



U.S. Department of Justice

Immigration and Naturalization Service

DZ

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

MAR - 6 2001

File: WAC-99-121-53761 Office: California Service Center

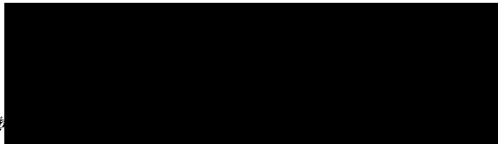
Date:

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



Identification card should be
present clearly unobstructed
in view of personnel

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a rehabilitation services provider with two employees and a gross annual income of \$1,000,000. It seeks to employ the beneficiary as an occupational therapist for a period of three years. The director determined the beneficiary had already exceeded his six-year limit in H-1B status.

On appeal, counsel argues that the beneficiary was absent from the U.S. for a period exceeding 12 months and is eligible for a second period of six years.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Title 8 C.F.R. 214.2(h)(13)(i)(B) states that:

When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad. (Emphasis added).

Title 8 C.F.R. 214.2(h)(13)(iii)(A) states in part that:

An H-1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section

101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

The petitioner has provided copies of the arrival/departure stamps from the beneficiary's passport and the following "Timeline for period of [the beneficiary's] physical absence from the United States":

9/24/97 - Left the U.S. - Entered Canada. Note that [the beneficiary] is a Canadian Resident, and therefore arrival and departure records are not always recorded in the passport, but are often recorded on the declaration papers.

12/29/97 to 02/25/98 - Visited Philippines

02/25/98 to 02/27/98 - Hong Kong to China

02/27/98 to 02/28/98 - China to Hong Kong

02/28/98 to 03/27/98 - Visited Philippines

03/28/98 to 04/03/98 - Visited Australia

04/03/98 to 05/26/98 - Visited Philippines

05/98 to 09/98 - Visited Canada - (no stamp stamped declaration)

09/21/98 - Arrived England Departed 10/03/98 from Schiphol, the Netherlands

Although the above information indicates that the beneficiary resided for several months in Canada, the record contains none of the evidence required by regulation such as the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad, to show that the beneficiary was physically present outside of the U.S. during the immediate prior year. It is also noted that the beneficiary was authorized to work in the U.S. in H-1B status through April 15, 1998, at [REDACTED] and through May 25, 1998, at [REDACTED]. According to the above timeline, the beneficiary terminated his employment with both [REDACTED] and [REDACTED] Inc. as of September 24, 1997, when he departed the U.S. The record, however, contains no evidence to support such claim. Upon review of the record, the evidence does not sufficiently demonstrate that the beneficiary resided and was physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year to his entry to the U.S. on October 28, 1998. For this reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.